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CAN-SPAM ACT RULEMAKING

PROJECT NO. R411008

COMMENTS OF ACA INTERNATIONAL IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S NOTICE OF PROPOSED RULEMAKING:

DEFINITIONS, IMPLEMENTATION, AND REPORTING REQUIREMENTS UNDER THE CAN-SPAM ACT

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INTRODUCTION

The following comments are submitted on behalf of ACA International ("ACA") in response to the request by the Federal Trade Commission ("FTC" or "Commission") for comments regarding the CAN-SPAM Act notice of proposed rulemaking. *See* Notice of Proposed Rulemaking, 70 Fed. Reg. 25426 (May 12, 2005) ("NPRM").[1] Pursuant to the NPRM, the FTC seeks to promulgate rules on five broad CAN-SPAM topics including the definition of a "sender" and the scope of transactional or relationship messages. The resolution of this rulemaking will have a profound impact on the ability of the accounts receivable management industry to annually recover billions of dollars of outstanding payment obligations for goods and services delivered to consumers.

It is for this reason that ACA respectfully requests that the Commission utilize this rulemaking to confirm that electronic mail sent by or on behalf of a creditor for the purpose of recovering an outstanding payment obligation ("debt collection e-mail") is not subject to the CAN-SPAM Act and the implementing regulation because they are not commercial electronic mail messages. To the extent that the Commission concludes that debt collection e-mails are subject to the Act and proposed regulation, ACA believes that the e-mails are transactional or relationship messages and therefore exempt from most of the Act and proposed regulation.

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[1] These comments supplement those filed with the Commission by ACA on September 13, 2004, and March 31, 2004, in response to other Commission requests for comments on the CAN SPAM Act. *See* http://www.ftc.gov/os/comments/canspam/OL102206.pdf (March 31, 2004 ACA comment); *see also* http://www.ftc.gov/os/comments/canspam2/OL-100115.pdf

Such an outcome is dictated by the intent of Congress in enacting the federal statute and is required to maintain consistency with the CAN SPAM final regulations promulgated by the Federal Communications Commission. Indeed, in September 2004, the FCC stated that "we believe that messages from a person or entity with whom the recipient has previously agreed to enter into a transaction and that concern a debt owed for that transaction would fall under the exemption." Final Rule, 69 Fed. Reg. 55765, 55774 col.1 (Sept. 16, 2004).

I. Statement on ACA

ACA International is an international trade organization of credit and collection professionals who provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors, and vendor affiliates. Members comply with all applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activity of ACA members is regulated by the Commission under the FDCPA, 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and other state and federal laws.

Although enacted more than 25 years ago and long before Congress appreciated the extent to which electronic mail would be the favored – if not exclusive – method of transacting legitimate business, the FDPCA nonetheless is sufficiently broad to apply to this now commonplace method of communication. With particular reference to electronic mail, the

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(Sept. 13, 2004 ACA comment).

FDPCA broadly defines "communications" subject to the statute as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The Commission has construed this to include both "oral and written transmissions of messages which refer to a debt." *See* Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 500097, 50101 (Dec. 13, 1998) (definition of "communication").

II. ACA Members Play a Vital Role in Safeguarding a Healthy Economy

Uncollected consumer debt threatens America's economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States $683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. By itself, outstanding credit card debt has doubled in the past decade and now approaches three quarters of a trillion dollars. Eileen Alt Powell, *Consumer Debt More Than Doubles in a Decade*, Associated Press, Jan. 6, 2004. Total consumer debt, including home mortgages, exceeds $9 trillion. William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*, Wash. Post, Jan. 12, 2004. Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations. For example, between 1989 and 2001, American families with annual incomes of less than $10,000 experienced a 184% increase in their average debt.

The harmful effects of uncollected debts also negatively impacts consumers. This fact is reflected in the continued increase in consumer bankruptcies. In 2003, there were more than 1.63 million personal bankruptcies filed, representing a 5.6% increase from 2002 levels.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of practically every community's businesses. We represent the local hardware store, the retailer down the street, and the local hospital. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are returned to business and reinvested. For example, ACA members recovered and returned over $30 billion in 1999 alone, a massive infusion of money into the national economy. Without an effective collection process, the economic viability of these businesses, and by extension, the American economy in general, is gravely threatened. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

As technology has advanced, many consumers prefer to use electronic mail as the primary method of initiating transactions and maintaining their customer relationships. Much the same as cellular telephones increasingly have supplanted land-line telephone service, electronic mail has grown to rival more traditional forms of written communications. In light of this growth of e-mail as the dominant method of communications, it is essential that creditors and their agents in the accounts receivable management industry be able to recover

outstanding payments using modern technology such as electronic mail.

III. Comments on Specific Questions

In response to the NPRM, ACA makes the following comments tracking the specific questions (set off in bold emphasis) raised by the Commission:

2. Section 316.2(o)—"Transaction or Relationship Message"

b. Should debt collection e-mails be considered "commercial"?

Or, should debt collection e-mails be considered transactional or relationship messages that complete a commercial transaction that the recipient has previously agreed to enter into with the sender? Such an interpretation assumes that the entity with whom the recipient transacted business is the entity sending the collection e-mail, or that the term "sender" can be interpreted to encompass a third party acting on behalf of one who would otherwise qualify as a sender. Can a third-party debt collector be considered a "sender"?

ACA's Comment: The Commission should clarify that e-mails sent by a creditor, or on its behalf, in order to effectuate the recovery of an outstanding payment obligation are not subject to the statute and regulation. In this regard, ACA supports the statement in the NPRM that "[t]he Commission agrees that certain types of messages may not satisfy either the 'commercial' or 'transactional or relationship' definitions, and thus are not regulated by CAN-SPAM." 70 Fed. Reg. at 25433 n.85.

E-mail communications sent to debtors for the purpose of collecting debts ("debt

collection e-mails") are clearly not the kind of unsolicited "commercial electronic mail message" Congress intended to regulate under the CAN-SPAM Act. The FTC should clarify the fact that debt-collection e-mails are not subject to the CAN-SPAM Act and, therefore, should not be included in the registry.

The CAN-SPAM Act defines the key jurisdictional term "commercial electronic mail message" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." CAN-SPAM Act § 3(2)(A). The Act further directs the FTC to issue regulations defining the relevant criteria for determining an e-mail's "primary purpose." Under the proposed rule, the Commission proposes to construe the "primary purpose" of an e-mail as commercial if it:

(1) contains only content that advertises or promotes a product or service;

(2) contains content that advertises or promotes a product or service as well as content that relates to transactional or relationship functions such as facilitating, completing or confirming the transaction *if* the recipient reasonably interprets the subject line to advertise or promote a product or service or the transactional information does not appear at or near the beginning of the message; or

(3) contains content that advertises or promotes a product or services as well as other content unrelated to a transactional or relationship function *if* the recipient reasonably interprets the subject line or body to convey such information.

See 16 C.F.R. § 316.3 (proposed).

It should be obvious that an e-mail seeking to recover a debt does not have as its primary purpose the advertisement or promotion of a commercial product or service. Whether send by creditors or debtor collectors acting on creditors' behalf, these emails have the purpose of effectuating payment for goods and services received by consumers without full payment. Such communication does not advertise or promote products or services. It merely seeks to recover money owed for a product, service, or loan that already has been provided but has not been fully paid for by the debtor. The FTC should acknowledge in the final rule that debt collection e-mails are not commercial as that term is used in the Act, that is, they do not advertise or promote a product or service.

The FTC also should acknowledge that payment services incidental to the collection of debts by e-mail are not subject to the CAN-SPAM Act. Payment options are commonly offered as part of an e-mail communication to collect a debt. A debt collector will send to the debtor a collection notice electronically, an "e-collection" notice, which includes an electronic payment option. If the debtor elects the option, the transaction is processed electronically by e-check, debit or credit card and the debt is paid off. Consumers, creditors and collection agencies all benefit from the costs saved by encouraging this type of efficient, elective payment transaction.

Regardless of the method of payment, the purpose of e-collection is to communicate with a debtor about his or her debt. An incidental aspect of the communication is to offer an

additional option to the debtor to pay off the debt by an electronic process. Including this additional information about the consumer's payment options, however, should not be deemed to be a "commercial advertisement or promotion of a commercial product or service" under the statute or final rule.

Debt collection e-mails, at most, are transaction or relationship messages. Congress explicitly exempted such messages from the CAN-SPAM Act. The Act defines such messages to include e-mails, the primary purposes of which is "to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender," CAN-SPAM Act § 3(17)(A)(i), or "to provide– . . . account balance information or other type of account statement with respect to [an] account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender." CAN-SPAM Act § 3(17)(iii)(III). The Act also authorizes the FTC to modify this definition to "accomplish the purposes of this Act." CAN-SPAM Act § 3(17)(B).

To the extent that the Commission does not expressly exempt debt collection e-mails, ACA urges the Commission to make clear in this rulemaking that debt collection e-mails would be considered, at most, "transactional or relationship messages" within the meaning of the CAN-SPAM Act, and therefore not subject to the final rule. The language of section 3(17) would seemingly make this clear except that a third-party debt collector "sender" acting on behalf of a creditor might not be considered the party with whom the recipient entered into a debtor-creditor relationship.

There is nothing in the Act, however, to suggest that Congress intended to create a loophole in the definition of "transactional or relationship messages" through which debtors could escape collection e-mails. A debt collector operates as an agent of the creditor. In the Act's terminology, collection agencies are paid to "complete . . . a commercial transaction that the recipient has previously agreed to enter into. . . ." It would defy common sense, not to mention congressional intent, for a debt collection e-mail to be considered anything more than a "transactional or relationship" message. The Commission should make this point plain in the final rule to prevent it from being construed as blocking legitimate debt collection.

Many of the protections embodied in CAN-SPAM already govern the accounts receivable management industry. For example, the FDCPA regulates the practices of debt collectors in locating debtors, 15 U.S.C. § 1692b, in restricting how and how often debtors may be contacted, 15 U.S.C. § 1692c, in preventing harassment or abuse, 15 U.S.C. § 1692d, or false or misleading representations, 15 U.S.C. § 1692(e). The FDCPA imposes stiff penalties, *see* 15 U.S.C. § 1692k, and confers robust administrative enforcement powers on the FTC. *See* 15 U.S.C. § 1692*l*. Indeed, the FDCPA gives consumers the right to cease communications with debt collectors. *See* 15 U.S.C. § 1692c(c). In short, the FDCPA already establishes a welter of finely-tuned behavioral restrictions on the debt collection industry, and it already protects debtors from abusive communications via the Internet or any other means.

Another approach available to the Commission is to exempt debt-collection e-mails from the regulation by excluding FDCPA-based "communication[s]" from the CAN-SPAM

Act and the implementing regulation. The statutory definition of "communication" under the FDCPA is specific and broad: "The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The regulatory regime established by the FDCPA protects consumers and limits communications by collection agencies. Ultimately, it would not fulfill the intent of Congress to enable debtors to block e-mail communications seeking to recover valid debts. In effect, subjecting creditors and their collection agencies to the CAN-SPAM rule for these type of communications would do nothing to correct the spam problem and would do much to harm the nation's economic well-being.

2. Section 316.2(o)—"Transaction or Relationship Message"

a. If an e-mail message contains only a legally mandated notice, should this message be considered a transactional or relationship message? Which, if any, of the existing categories of transaction or relationship message would such a message likely fit into? If such a message were considered not to have a transactional or relationship purpose, would it be exempt from regulation under the Act?

ACA's Comment: In the specific context of the recovery of outstanding payment obligations, an e-mail message that contains only a legally mandated notice should be considered a transactional or relationship message. The FDCPA, as well as many state-collection laws, require the delivery of written information to debtors during the collection process. For example, section 809(a) of the FDCPA requires a collector, within 5 days of the

first communication, to provide the consumer a written notice (if not provided in that communication) containing (1) the amount of the debt and (2) the name of the creditor, along with a statement that he will (3) assume the debt's validity unless the consumer disputes it within 30 days, (4) send a verification or copy of the judgment if the consumer timely disputes the debt, and (5) identify the original creditor upon written request. 15 U.S.C. § 1692g(a). As such, debt collectors are required by law to deliver a written notice in compliance with the statutory obligation.

When the written notice is sent to a debtor in an electronic format, it is for the purpose of facilitating, completing or confirming a commercial transaction that the recipient has previously agreed to enter into with the sender, CAN-SPAM Act § 3(17)(A)(i), or "to provide . . . account balance information or other type of account statement with respect to [an] account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender." CAN-SPAM Act § 3(17)(iii)(III). Thus, such notices should be considered transaction or relationship messages.

2. Section 316.2(o)—"Transaction or Relationship Message"

f. If the primary purpose of an e-mail message is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, it is a transactional or relationship message under section 7702(17)(a)(i). Should messages from affiliated third parties that purport to be acting on behalf of another entity (the one with whom the recipient transacted) be considered

transactional or relationship messages under this provision?

ACA's Comment: "Sender" is defined under the Act as "a person who initiates [a commercial electronic mail] message and whose product, service, or Internet Web site is advertised or promoted by the message." 15 U.S.C. § 7702(16)(A). A creditor or a debt collector that sends a debt collection e-mail is not a "sender" under the Act because there is no advertisement or promotion of a product. *See* 70 Fed. Reg. at 25431 col.1 ("The Act is quite clear that the definition of 'sender' includes two elements: one must initiate a message *and* advertise one's own product, service, or Web site in order to be a 'sender'") (emphasis in original). This particularly is true for debt collectors because they simply are effectuating recovery of a debt for goods or services delivered based on the advertising or promotion of a creditor. As the Commission has noted, "the Act's definition of 'sender' simply does not apply to entities that do nothing more than provide a list of names or transmit a commercial e-mail message on behalf of those whose products or services are advertised in the message". 70 Fed. Reg. at 25431 col.1. For these reasons, the final rule should clarify that debt collection e-mails do not trigger the "sender" specific obligations under the Act and proposed regulation.

IV. General Comments

ACA has several general comments about the proposed rule. First, ACA believes that the FTC must be especially sensitive to make sure that the regulations do not impede sending state or federally required privacy notices. Similar to the privacy notices imposed by federal laws such as the Gramm-Leach-Bliley Act, there are many additional notice obligations that

Congress presently is considering, for example, in the area of security breaches. To the extent that a federal or state law permits or requires the electronic sending of a statutorily-imposed notice, the final regulations should not be construed to prohibit creditors and debt collectors from complying with other laws by sending a notice by e-mail.

As a trade association, ACA also is concerned about the impact of the proposed regulations on members of trade associations. For example, the FTC states in the proposed rule that it believes messages sent from an association to its members are likely transactional or relationship messages. If the association's messages are primarily commercial, however, then the association is obligated to comply with CAN-SPAM requirements. Moreover, the FTC requests comments on whether messages sent by an association to its members whose primary purpose is to deliver products and services should be considered transactional or relationship messages. As the FTC is well aware, there is abundant information developed in this and other rulemaking proceedings concerning the important role of trade associations when communicating with members. Frequently these communications are in e-mails. There is a significant risk that, unless associational e-mails are deemed transactional or relationship messages, the regulation may prevent members from receiving benefits or notice of new benefits in a timely and efficient manner.

Finally, the proposed regulation states that the definition of "sender" does not apply to third-party list providers or entities that do nothing more than provide a list of names or transmit a commercial message on behalf of those whose products or services are advertised in

the message. However, the FTC seeks comments on whether opt-out obligations should be extended to third-party list providers. ACA believes that list providers should be responsible for opt-out requirements and maintaining an opt-out list; list recipients should not be required to maintain an opt-out list for the list provider.

CONCLUSION

Debt collection is vital to the national economy. The advent of e-mail makes a debtor's life less intrusive than it was in the pre-Internet era when written letters or live phone calls were often the only means available to contact debtors. ACA's position is that the CAN-SPAM Act should not be construed by the FTC to hold that debt-collection e-mails are spam. Nor should the Commission promulgate a rule that empowers debtors with the unwarranted ability to block legitimate attempts to secure the recovery of outstanding payments. ACA appreciates the opportunity to comment on the Commission's proposed Disposal Rule. If you have any questions, please contact Rozanne Andersen, ACA International General Counsel and Senior Vice President of Legal and Governmental Affairs, at (952) 928-8000 ext. 132, or Andrew M. Beato at (202) 737-7777.